140

(4)

No. 09-235

Supreme Court, U.S.
FILED
SEP 25 2009
OFFICE OF THE CLERK

In the
Supreme Court of the United States

MACERICH MANAGEMENT CO., *et al.*

Petitioners,

v.

UNITED BROTHERHOOD OF CARPENTERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DEBORAH J. LA FETRA
Counsel of Record
HAROLD E. JOHNSON
TIMOTHY SANDEFUR
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that states may require private shopping malls to allow public access to the malls' common areas for purposes of engaging in expressive activities. The expressive activity at issue in *PruneYard*—soliciting signatures for a political petition—was in support of a cause that the mall owners did not oppose and that did not conflict with the mall's commercial interests. The present case raises the following questions, unanswered by *PruneYard*:

1. Does a state law requirement that a private shopping mall provide access for expressive activity violate the mall owners' property rights under the Fifth Amendment where the activity—here, urging patrons to boycott the mall and its stores—conflicts with the mall's commercial interests?

2. Does a state law requirement that a private shopping mall provide access for expressive activity violate the mall owners' First Amendment free speech rights where the expressive activity supports a cause the mall owners oppose?

3. Should *PruneYard* be overruled?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF REASONS FOR GRANTING THE PETITION 2

ARGUMENT 2

I. THE COURT SHOULD GRANT CERTIORARI TO REVISIT, AND OVERRULE, *PRUNEYARD v. ROBINS* 2

A. PruneYard's Takings Clause Analysis Was Incoherent and Has Since Been Abrogated 4

II. THIS COURT SHOULD GRANT CERTIORARI TO UPHOLD THE FIRST AMENDMENT RIGHTS OF SHOPPING MALL OWNERS 12

A. First Amendment Rights, Including the Right Not To Speak, Apply to Corporate Speech as Well as Individual Speech 12

B. A Government Mandate That Private Property Owners Endure Offensive, Provocative Speech on Their Premises Violates the First Amendment 16

III. THE CRITERIA FOR OVERRULING *PRUNEYARD* HAVE BEEN MET 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 3, 15

Albertson's, Inc. v. Young,
107 Cal. App. 4th 106 (2003) 23

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 3

Brown v. Legal Found. of Washington,
538 U.S. 216 (2003) 5-6

Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986) 3

Center v. Robins, 447 U.S. 74 (1980) 2

Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., L.P.,
392 S.E.2d 8 (Ga. 1990) 11, 23

Cologne v. Westfarms Assocs.,
469 A.2d 1201 (Conn. 1984) 10, 23

Consolidated Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530 (1980) 12

Cross v. Texas, 2004 WL 1535606
(Tex. App. Ct.-El Paso) 1

Eastwood Mall, Inc. v. Slanco,
626 N.E.2d 59 (Ohio 1994) 11, 23

Fashion Valley Mall, LLC v. N.L.R.B.,
42 Cal. 4th 850 (2007) 10

TABLE OF AUTHORITIES—Continued

Page

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) 7, 22

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 12

Golden Gateway Center v. Golden Gateway Tenants Association, 26 Cal. 4th 1013 (2001) 1, 10, 23

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) 13

Hudgens v. N.L.R.B., 424 U.S. 507 (1976) 3, 16

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 14-16, 22

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 3

Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003) 20-21

Keller v. State Bar of California, 496 U.S. 1 (1990) 3

Lawrence v. Texas, 539 U.S. 558 (2003) 21

Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972) 3

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 7, 11, 22

TABLE OF AUTHORITIES—Continued

Page

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 6

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 13, 18, 22

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 20

Pac. Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986) 12-13, 15-16

Pelman ex rel. Pelman v. McDonald's Corp., 452 F. Supp. 2d 320 (S.D.N.Y. 2006) 19

Penn Central Transp. Co. v. New York, 438 U.S. 104 (1978) 6

Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992) 21

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 1, 4, 7, 13-16

Robins v. PruneYard Shopping Center, 23 Cal. 3d 899 (1979) 1

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 7

The Railroad Tax Cases, 13 F. 722 (C.C.D. Cal. 1882) 12

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 3

United States v. United Foods, Inc., 533 U.S. 405 (2001) 3

TABLE OF AUTHORITIES—Continued

Page

Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas, 535 U.S. 905 (2002) 1

Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882 (5th Cir. 2004) 5

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184 (2008) 3

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 15

Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 515 A.3d 1331 (Pa. 1986) . 10-11, 23

Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985) 8

Wooley v. Maynard, 430 U.S. 705 (1977) . . . 4, 13, 22

Rules of Court

Rules of Ct., R. 37.2(a) 1

Rules of Ct., R. 37.6 1

Miscellaneous

Bell, Joe, *Response to Misleading Union Protest at Meadowbrook Mall* (July 21, 2008), *available at* http://www.cafarocompany.com/Press/pdf/p65.pdf (visited Sept. 14, 2009) 19

Benson, Dan & Maller, Peter, *Target Bans Salvation Army Kettlers*, Milwaukee Journal Sentinel, Oct. 18, 2004 (2004 WLNR 17251123) 9

TABLE OF AUTHORITIES—Continued

Page

Center for Science in the Public Interest, *Nutrition Action Health Letter*, *available at* http://cspinet.org/nah/index.htm (visited Sept. 15, 2009) 19

Cohen, Rick, *Target v. Salvation Army? It's About More Than Just Bell Ringers*, Non-Profit Times, Feb. 1, 2005 (2005 WLNR 26459515) 9

Eagle, Steven, *Regulatory Takings*, (3d ed. 2005) 5, 8

Ely, James W., Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2d ed. 1998) 2

Fee, John E., *Comment: Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994) 5

Kanner, Gideon, *Hunting the Snark, Not the Quark*, 30 Urb. Law. 307 (1998) 8

La Fetra, Deborah J., *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case Western Res. L. Rev. 1205 (2004) 1

La Fetra, Deborah J., *Recent Developments in Mandatory Student Fee Cases:* 10 J. L. & Pol. 579 (1994) 2

McKee, Mike, *Shopping for Trouble: Stores Increasingly in Court To Send Solicitors Packing*, San Francisco Recorder, July 12, 1999 8-9

TABLE OF AUTHORITIES—Continued

Page

Min-Young, Lee, *et al.*, *Competitive Analysis Between Regional Malls and Big-Box Retailers: A Correspondence Analysis for Segmentation and Positioning*, 13 J. of Shopping Ctr. Research 81 (2006) 17

Redish, Martin H. & Wasserman, Howard M., *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235 (1998) 12

Restatement (Second) of Torts § 162 (2009) 7

Richards, Robert D. & Calvert, Clay, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. Rev. 553, *available at* http://www.restaurant.org/pressroom/rrlist.cfm (visited Sept. 14, 2009) 20

Schoepflin, Frederick W., Comment, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 Wash. L. Rev. 133 (1989) 18

Sisk, Gregory C., *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 Harv. J. L. & Pub. Pol'y 389 (2009) 15-16

Sisk, Gregory C., *Uprooting the Pruneyard*, 38 Rutgers L.J. 1145 (2007) 18

TABLE OF AUTHORITIES—Continued

Page

Taruschio, Anna M., Note, *The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes*, 27 Fordham Urb. L. J. 1001 (2000) 17

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.[1]

PLF is the largest and most experienced nonprofit legal foundation of its kind. PLF litigates at all levels of state and federal courts in defense of private property rights, and participated as amicus curiae in *PruneYard v. Robins* both in this Court (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)) and in the California Supreme Court (*Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899 (1979)), as well as many subsequent cases seeking to apply *PruneYard*. *See e.g.*, *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 535 U.S. 905 (2002); *Golden Gateway Center v. Golden Gateway Tenants Association*, 26 Cal. 4th 1013 (2001); *Cross v. Texas*, 2004 WL 1535606 (Tex. App. Ct.-El Paso). PLF attorneys also have published on the subject of First Amendment rights. *See, e.g.*, Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case Western Res. L. Rev.

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

1205 (2004), and Deborah J. La Fetra, *Recent Developments in Mandatory Student Fee Cases:* 10 J. L. & Pol. 579 (1994).

SUMMARY OF REASONS FOR GRANTING THE PETITION

Certiorari is warranted here to revisit and to overrule this Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). That case was wrongly decided on both First and Fifth Amendment grounds. Subsequent decisions by this Court have undermined its rationale and have striven unconvincingly to distinguish or limit *PruneYard*. The decision has been criticized by several state courts and by legal commentators. This Court has also recharacterized its First Amendment analysis and distinguished *PruneYard* repeatedly in subsequent decisions. *PruneYard* meets the criteria for determining when a decision should be overruled. This is the appropriate case for revisiting and setting straight this important area of law.

ARGUMENT

I

THE COURT SHOULD GRANT CERTIORARI TO REVISIT, AND OVERRULE, *PRUNEYARD v. ROBINS*

PruneYard is a prime example of the inherent relationship between private property rights and other kinds of rights, and an apt illustration of the framers' belief that private property rights are "the guardian of every other right." James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 26 (2d ed. 1998) (quoting Arthur Lee).

Private property consists of a realm of autonomy that extends to physical objects or places, and includes an owner's right to bar others from entering the owned property. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This ability to exclude is essential to the freedoms of speech and association because freedom of expression and the right to exercise the prerogatives of ownership are fundamentally identical: they represent realms of individual free choice which other individuals, and the government, must respect. *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1188 (2008); *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000).

This Court's precedent has recognized the connection between ownership and expression rights. Thus, states may not force individuals to contribute money to the propagation of opinions with which they disagree, whether those opinions be political, religious, or even commercial. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Keller v. State Bar of California*, 496 U.S. 1, 9-10 (1990); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 305 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977). Indeed, in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972), and *Hudgens v. N.L.R.B.*, 424 U.S. 507, 517-21 (1976), this Court explicitly held that the First Amendment does not entitle individuals to express themselves at privately owned shopping malls without the owners' consent. Such cases are consistent with the "essential principle" that "[i]ndividual freedom," including freedom of expression, "finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

Nevertheless, *PruneYard* allowed California state law to force mall owners to allow speech on their property, depriving these owners of their property right to exclude. *See* 447 U.S. at 82. It also deprived the owners of their First Amendment right not to subsidize the propagation of opinions which they do not wish to express. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713 (1977) ("[T]he State may [not] constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property."). This case is the proper vehicle for reinforcing the fundamental connection between private property and freedom of expression by revisiting the *PruneYard* case and overruling it.

A. PruneYard's Takings Clause Analysis Was Incoherent and Has Since Been Abrogated

The basic flaw in *PruneYard*'s takings analysis lay in the confusing overlap of the principle of "investment-backed expectations" with more fundamental, categorical principles that define the foundations of property rights. The *PruneYard* Court acknowledged that "there ha[d] literally been a 'taking'" of the mall owners' right to exclude. 447 U.S. at 82. This should have ended the takings analysis. But the Court proceeded to apply the vague multi-factor test employed when property is subjected to regulations diminishing its value. *See id.* at 82-83. The errors in this approach were manifold.

First, a law requiring a property owner to submit to a trespass is a compensable taking regardless of the time period involved. This is because, unlike some regulatory diminutions in value, a trespass is a discrete incident which can be readily separated into a

single, compensable "stick" for purposes of compensation.

When regulations eliminate part, but not all, of a property's use, courts have struggled with the problem of determining whether to treat that property as composed of segments, each of which is separately compensable, or whether to treat it as a unified whole, the total value of which has merely been diminished. *See, e.g., Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 889 n.5 (5th Cir. 2004). But a trespass is by nature a particularized, all-or-nothing intrusion, readily divisible from other incidents of or burdens on ownership. For this reason, property owners can sell the right to enter property at a particular time and place—as when an amusement park sells admission tickets. Each trespass permanently and totally deprives the owner of a particularized property right. Trespasses are therefore susceptible of *per se* treatment rather than the more *ad hoc* balancing approach used in regulatory takings cases. *See* Steven Eagle, *Regulatory Takings*, 823-24 (3d ed. 2005) (compensation should be awarded for the appropriation of any property interest for which there is a "ready market"); John E. Fee, *Comment: Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994) (compensation should be awarded for the taking of "any identifiable segment of [property] . . . if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding [property] segments.")

In *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003), this Court found that a categorical analysis was appropriate for determining whether the confiscation of interest on legal trust accounts was a

taking under the Fifth Amendment. Such appropriations were "more akin to the occupation of a small amount of rooftop space in *Loretto*," *id.* at 217-18, in part because they are takings of discrete and readily quantifiable property interests, as opposed to the situation where a law imposes a broad diminution in the value of a whole bundle of rights. Likewise, a deprivation of an owner's right to exclude, even though brief relative to the life span of the property, is nevertheless a compensable taking of a particular right.

Second, the *ad hoc*, fact-intensive analysis of *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978), should not apply to trespasses. That approach is justified on the grounds that restrictions on property rights are often complicated by various economic factors: whether a regulation (rather than other dynamic economic factors) actually diminishes the property's value, whether the property owner actually expected to use the property in the relevant respect, whether the owner actually possessed the right to use the property that way (or whether such uses were already barred by "background principles" of state law, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992)), are factors that require a complicated, fact-intensive approach. But a trespass is a clearly recognizable, categorical matter. By treating forced trespasses only as a diminution of value, *PruneYard* ran counter to the overwhelming history of the common law, which regarded trespasses as a unique category of property infringement. The common law treats trespasses as a special kind of harm, to be remedied by both damages and injunction, and without requiring the plaintiff to prove the value

of his injury. *See Restatement (Second) of Torts* § 162 (2009).

Although *Loretto* held that forced trespasses are *per se* takings, that case distinguished *PruneYard* on the grounds that the mall owners were not required to submit to a *permanent* trespass; purportedly categorically distinct from temporary ones. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n.12 (1982). But the Court subsequently acknowledged that temporary takings of discrete property rights are "not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318 (1987). Moreover, because trespasses are deprivations of discrete property rights, they are not "normal delays" diminishing a whole property's general market value, like laws requiring building permits, zoning variances, or rules "prohibiting access to crime scenes, businesses that violate health codes, [or] fire-damaged buildings." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002). Rather, they are total confiscations of particular property rights.

Third, *PruneYard*'s application of the *ad hoc* balancing approach led to some bizarre conclusions. The Court, for example, concluded that the mall owners' right to exclude was not "essential to the use or economic value of their property." 447 U.S. at 84. Yet the right to exclude is part of the definition of property rights; it is not simply an item to be weighed in valuing that property. In *Loretto*, the trespass had a minute impact on the economic value of the property,

but the Court did not weigh that against other factors. And in *Kaiser Aetna*, the property owners made no showing "that opening the marina to members of the public would unreasonably impair its value or use; at least the Court made no mention of any such showing." Gideon Kanner, *Hunting the Snark, Not the Quark,* 30 Urb. Law. 307, 321 (1998).

Moreover, the right to exclude is *essential* to the economic value of shopping centers that depend heavily on their ability to control access to their land. A major factor in attracting customers is the ambience created by the management's choices of including and excluding particular uses, thus fostering feelings of comfort, security, and enjoyment for consumers. "[M]any individuals patronizing these facilities seek an oasis in their hectic lives and wish to shop or spend their family time in private facilities away from the public spaces that are for some liberating but for others threatening." Eagle, *supra*, at 515.

Shopping mall owners regularly and strongly assert their property rights against the *PruneYard* rationale, because it obstructs their ability to provide the type of atmosphere necessary to the successful operation of a shopping mall. *See, e.g., Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 357 n.47 (Mich. 1985) ("The malls argue . . . that mandated political access would impose unreasonable harm on shopping centers."). Indeed, with petition circulation becoming an increasingly economic enterprise, and paid petition circulators aggressively targeting shoppers for signatures, owners have been forced to undertake greater efforts to maintain control over their properties. *See* Mike McKee, *Shopping for Trouble: Stores Increasingly in Court To Send Solicitors*

Packing, San Francisco Recorder, July 12, 1999. Under *PruneYard,* these owners suffer not only unwanted entries onto their property, but also from frequent lawsuits that test the boundaries of their right to exclude.

Many shopping centers have taken drastic steps to bar unwanted intrusions on their property, and yet doing so is often a complicated and delicate process. In 2004, Target (a common anchor store in shopping centers) announced it would not allow Salvation Army "bell ringers" on its property during the Christmas shopping season, because the company determined that it could not legally allow the Salvation Army while barring other solicitors. *See* Dan Benson and Peter Malier, *Target Bans Salvation Army Kettlers,* Milwaukee Journal Sentinel, Oct. 18, 2004 (2004 WLNR 17251123). The company's spokeswoman explained, "if we continue to allow the Salvation Army to solicit, then it opens the door to other groups that wish to solicit our guests." *Id.* The decision was highly unpopular with consumers and led to protests against Target; its competitor, Wal-Mart, took the opportunity to promote its willingness to allow Salvation Army solicitors—but only for two weeks per year and for no more than three consecutive days. Rick Cohen, *Target v. Salvation Army? It's About More Than Just Bell Ringers*, Non-Profit Times, Feb. 1, 2005 (2005 WLNR 26459515). These companies would prefer to allow Salvation Army collectors on their property while barring other solicitors who offend customers or oppose the businesses themselves, but current law does not allow them to exercise their property rights in that fashion.

Reducing the ability of shopping mall owners to exclude unwanted speakers from their land can have dangerous consequences. In *Cologne v. Westfarms Assocs.*, 469 A.2d 1201 (Conn. 1984), a shopping center was enjoined from barring a women's political advocacy group from circulating literature on its premises. *Id.* at 1204. A month later, the Ku Klux Klan appeared, demanding access to the mall for political expression. *Id.* at 1205. When the owners refused, more Klan members arrived, and a "heated demonstration" occurred at the mall, to which "[p]olice from several area towns and the state police" were summoned "to bring the situation under control. This demonstration resulted in the closing of some of the stores in the Mall for a portion or for the remainder of that day." *Id.* Recognizing that forbidding mall owners from exercising the right to exclude was leading to "a highly dangerous situation which the police would be unable to control," *id.*, the trial court dissolved the injunction, and the state supreme court found that the state constitution did not entitle individuals to speak on the private property of others. *Id.* at 1210.

Fourth, most state courts considering the issue have rejected the rationale of the California *PruneYard* decision on grounds that also undermine this Court's decision. *See Golden Gateway Ctr.*, 26 Cal. 4th 1013, 1021 n.5 (listing state decisions rejecting the *PruneYard* rationale); *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 874 (2007) (Chin, J., dissenting) (same). These courts found that forcing property owners to admit speakers would violate private property rights, constitute "significant governmental intrusion into private individuals' affairs and relations," and "deprive individuals of important rights of freedom." *Western Pennsylvania Socialist*

Workers 1982 Campaign v. Connecticut General Life Ins. Co., 515 A.3d 1331, 1335 (Pa. 1986).

In *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., L.P.*, 392 S.E.2d 8, 9 (Ga. 1990), the Georgia Supreme Court rejected the *PruneYard* rationale on the grounds that "under the federal constitution, the owner of a privately owned and operated shopping center may prohibit the distribution of handbills or petitions unrelated to the operations of the center." In *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 61-62 (Ohio 1994), the Ohio Supreme Court also rejected the *PruneYard* theory because "[t]he right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities with another's business . . . . The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." (citations omitted).

Depriving mall owners of the right to exclude is a particularly "serious form of invasion of [their] property interests." *Loretto*, 458 U.S. at 435. It is also characteristically distinct from the broad decrease in value that this Court has addressed through multifactor analyses. *PruneYard* slighted the importance of the right at issue, applied an inappropriate test, and confused the relevant questions. This case presents a fitting opportunity to correct an important area of takings law.

II

THIS COURT SHOULD GRANT CERTIORARI TO UPHOLD THE FIRST AMENDMENT RIGHTS OF SHOPPING MALL OWNERS

A. First Amendment Rights, Including the Right Not To Speak, Apply to Corporate Speech as Well as Individual Speech

Because corporations are groups of individuals who pool their rights and resources for common purposes, corporations are generally said to enjoy constitutional status as "persons." But this is only a convenient shorthand for the fact that owners and managers have constitutionally protected rights. *See The Railroad Tax Cases*, 13 F. 722, 747-48 (C.C.D. Cal. 1882) ("[C]ourts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in [the corporation's] name."). Thus, the individuals who comprise a corporation may exercise their freedom of speech by expressing themselves together, in the name of the corporation. Indeed, their doing so is often an important ingredient in public debate and discussion. *Pac. Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion) ("Corporations . . . contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.") (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Consolidated Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 544 (1980)). *See also* Martin H. Redish and Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free*

Expression, 66 Geo. Wash. L. Rev. 235, 236 (1998) ("Who . . . has a greater interest in what actions the government takes with regard to the economy than corporations, whose very survival may well turn on the success or failure of those actions?").

Individual First Amendment rights include the right not to speak, and not to be forced to endorse messages with which one disagrees. *See, e.g., Wooley*, 430 U.S. at 714 (freedom of thought and expression "includes both the right to speak freely and the right to refrain from speaking at all"). The First Amendment protects both a person's freedom to express her views and a "concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985).

Because individuals enjoy this right to refrain from speaking, the corporations they form also enjoy this right. For example, a newspaper cannot be required to respond to candidates' arguments when it might prefer to be silent. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). And a private utility company cannot be forced to distribute a newsletter published by a third party. *Pac. Gas & Elec. Co.*, 475 U.S. at 9.

This Court appeared to set these concerns aside when it decided, in *PruneYard*, 447 U.S. at 76-77, 81, that the California Supreme Court's expansive reading of that state's free expression guarantee was consistent with the mall owner's federal constitutional rights. This Court decided that forcing property owners to provide a forum for speech with which they might disagree did not violate the owner's First Amendment rights, for three reasons: First, the shopping center was

open to the public, making it unlikely that the opinions of trespassing speakers would be attributed to the owners. *Id.* at 87. Second, the state did not require that any specific message be displayed and this content-neutrality ensured that the government would not discriminate for or against any message. Third, owners could engage in their own speech to disclaim support of the petition circulators' message. *Id.* at 87-88.

PruneYard is not reconcilable with other First Amendment cases involving the right not to speak, and for the most part, the Court has skirted the conflicts between these cases. In *Pacific Gas and Electric Co.*, which struck down a state's requirement that private companies distribute the messages of third parties, this Court distinguished *PruneYard* on the grounds that "the owner [in *PruneYard*] did not even allege that he objected to the content of the pamphlets; nor was the access right content based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible." 475 U.S. at 12. Subsequent cases therefore focused on whether the property owner objects to the message being distributed. *See also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 579-80 (1995) (noting that, because the mall owner in *PruneYard* never alleged offense, the distribution of pamphlets did not threaten the owners' autonomy).

These cases illustrate the tension between two, often competing, conceptions of the freedom of speech: one views expressive rights as centered around individual autonomy, and the other views it as a component of democratic government. Where concerns of individual autonomy are paramount, negative speech rights hold sway; but where the "marketplace of ideas"

is the primary interest, courts are inclined to hold that the solution to unwanted speech is more speech. This Court's protection of individual autonomy explains the results in such cases as *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943) (invalidating a state law requiring elementary school students to salute the American flag, because the "principles [embodied in the Bill of Rights] grew in soil which also produced a philosophy that the individual was the center of society"); *Abood*, 431 U.S. at 234-35 (allowing agency shop fee payers to disassociate from union speech with which they disagreed); *Hurley*, 515 U.S. at 575 ("[W]hatever the reason [to disagree with a certain point of view], it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."), and *Pac. Gas and Elec. Co.*, 475 U.S. at 11 (refusing to allow a state agency to dictate the contents of a private utility's billing envelope).

PruneYard stands as an aberration in the context of these decisions, because it employed the marketplace of ideas theory in what was literally a *private* marketplace. 447 U.S. at 87-89. The Court has shown particular consideration to property owners whose property would be converted to use by other speakers when the property owner can be expected to oppose the message that the intruders seek to convey. *Pac. Gas and Elec. Co.*, 475 U.S. at 15-16 (quoting *PruneYard*, 447 U.S. at 100) ("'This pressure to respond 'is particularly apparent when the owner has taken a position opposed to the view being expressed on his property.' "). After all, the right to refrain from speaking rings "hollow if a landowner must make his property a platform for expression he finds offensive." Gregory C. Sisk, *Returning to the PruneYard: The*

Unconstitutionality of State-Sanctioned Trespass in the Name of Speech, 32 Harv. J. L. & Pub. Pol'y 389, 397 (2009).

By asserting in this case that the union may protest on Macerich's privately owned shopping center properties, the decision below conflicts with one of this Court's most fundamental doctrines—that *state action* is required in order for constitutional protections to be triggered. "[T]he guarantees of free speech . . . guard only against encroachment by the government and 'erec[t] no shield against merely private conduct.' " *Hurley*, 515 U.S. at 566 (citation omitted). The Constitution provides "a guarantee only against abridgment [of the right of free speech] by *government*, federal or state." *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 513 (1976) (emphasis added). As Justice Powell presciently observed in *PruneYard*, "state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." 447 U.S. at 97 (Powell, J., concurring). Those questions are explicitly presented in this case and warrant resolution by this Court.

B. A Government Mandate That Private Property Owners Endure Offensive, Provocative Speech on Their Premises Violates the First Amendment

Government compulsion of property owners to permit speech on their property creates a "pressure to respond." *Pac. Gas and Elec. Co.*, 475 U.S. at 15-16. This pressure occurs regardless of whether or not the speaker agrees with the speech and occurs at the time the government compels the owner to host the

unwarranted speech. *See* Anna M. Taruschio, Note, *The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes*, 27 Fordham Urb. L.J. 1001, 1039 (2000). Thus, while this Court sought to explain *PruneYard* in subsequent cases by reference to the fact that the mall owner in that case raised no objection to the content of the speech, this should have had no bearing on the First Amendment analysis. Rather, the analysis should have turned on the autonomy rights of the property owners.

In cases like *PruneYard*, that do not invoke the marketplace of ideas rationale, the Court should look no further than the right of the affected individual to speak or to remain silent. Particularly because this Court decides only very few of the cases that raise this issue, the constitutional rule announced should be one that can apply in the most common fact situation—where the owner *does* object to the speech he is commanded to host.

Shopping centers have a compelling need to protect their premises from speech that seeks to undermine their purpose for existence. Shopping centers must compete with big-box stores, warehouse club stores and e-retailing. Lee, Min-Young, *et al.*, *Competitive Analysis Between Regional Malls and Big-box Retailers: A Correspondence Analysis for Segmentation and Positioning*, 13 J. of Shopping Ctr. Research 81, 81-82 (2006). Requiring them to host speech activity imposes considerable costs on them, even beyond the risk that specifically anti-mall speech will succeed in encouraging boycotts. Shopping malls will be required "to assume the burdens of security for political protests, to allocate limited space to competing special interest groups, [and] to suffer potential liability if patrons are injured by

disruptive activists." Gregory C. Sisk, *Uprooting the Pruneyard*, 38 Rutgers L.J. 1145, 1191 (2007). Most of all, a shopping mall typically has reason to engage in only one type of speech: that which will encourage people to spend their money on the premises. Shopping mall managers encourage customers by advertising and promoting the mall's mix of shops and other services and entertainment. *Id.* at 94-95. Mall management must be silent on virtually every other topic to avoid alienating some portion of the customer base.

"Compared with the Court's liberal protection of newspapers, which exist to engage in expressive activity, it is unreasonable to burden shopping centers with an obligation to provide platforms for the dissemination of views with which the owners may disagree, when expressive activity represents no part of shopping centers' business functions." Frederick W. Schoepflin, Comment, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 Wash. L. Rev. 133, 144 (1989). This is true even when some owners may be indifferent to expressive activity unless it impairs the commercial viability of their shopping centers. Even when some owners do throw open their doors to speakers, the government cannot burden those who are more circumspect. Analogously, while some newspapers freely accept and print opposing views, the Court does not mandate an "equal time" policy for publications. *See Tornillo*, 418 U.S. 241.

Mall owners endure a very real pressure to respond to anti-mall speech on the premises. An effective corporate response must be made almost immediately to avert or minimize harm or simply to avoid being defined by one's opponents. When

unionized carpenters protested at Meadowbrook Mall in Bridgeport, West Virginia, last year, distributing handbills complaining about mall hiring practices, the mall responded in a press release that the "information contained in these handbills is scurrilous, inflammatory and flat-out wrong." The mall justified the actions of its general contractor and detailed the lengths to which the mall and the contractor went to appease the unions prior to the protest. Joe Bell, *Response to Misleading Union Protest at Meadowbrook Mall* (July 21, 2008).[2]

Companies—and even entire industries—often find it necessary to respond rapidly to attacks on their business practices. For example, the past few years have seen self-proclaimed health advocates excoriate certain restaurant chains for "supersizing" meal portions and thus "causing" obesity in their patrons. *See, e.g.*, Center for Science in the Public Interest, *Nutrition Action Health Letter* (containing a regular column attacking certain foods, such as Baskin-Robbins sundaes, as "food porn");[3] *Pelman ex rel. Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320 (S.D.N.Y. 2006) (blaming McDonald's for childhood obesity). In response to this growing trend, the National Restaurant Association created a "Rapid Response Program" specifically designed to "rebut denigrating and negative portrayals of the restaurant industry wherever they occur in the media, as well as to commend portrayals

---

[2] *Available at* http://www.cafarocompany.com/Press/pdf/p65.pdf (visited Sept. 14, 2009).

[3] *Available at* http://cspinet.org/nah/index.htm (visited Sept. 15, 2009).

that accurately and positively describe the industry."[4] This type of response is growing more common, as businesses of all types seek to counter bad publicity with positive information. Robert D. Richards and Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. Rev. 553, 568. Such exchanges are normal and even laudable in the "uninhibited, robust . . . wide-open . . . vehement, caustic, and sometimes unpleasantly sharp" realm of free public debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Yet in California, where the malls in this case are located, businesses often may be unable to respond even if they want to. A business' ability to engage in counter-speech in California is particularly chilled given the California Supreme Court's decision in *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003). In that case, a national corporation sought to respond to public attacks on its business practices by publishing reports disputing the factual assertions on which those attacks were based. Despite the fact that such give-and-take is precisely what the First Amendment was designed to protect, activists sued the company under California's "unfair competition law," arguing that the speech was an unfair business practice. The company's defense—that its speech was protected First Amendment expression—was rejected by the California Supreme Court. Although this Court's grant of certiorari was dismissed for procedural reasons, Justice Breyer summed up the impact of the California Supreme Court's decision accurately: "The upshot is

---

[4] *Available at* http://www.restaurant.org/pressroom/rrlist.cfm (visited Sept. 14, 2009).

that commercial speakers doing business in California may hesitate to issue significant communications relevant to public debate because they fear potential lawsuits and legal liability." 539 U.S. at 682 (Breyer, J., dissenting).

Shopping mall owners must not be made to serve up their private property to host the speech activities of others, particularly when those others have no purpose other than to cause economic harm to the mall itself. Mall owners are under tremendous pressure to respond to these attacks, contrary to their preference of remaining silent. This Court should grant certiorari to uphold the First Amendment rights of private shopping mall owners to forbid third-party speech on their property.

III

THE CRITERIA FOR OVERRULING *PRUNEYARD* HAVE BEEN MET

While *stare decisis* is an important legal principle that protects citizens' reliance interests, those interests cannot justify keeping a wrongly decided case on the books. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). *PruneYard* was incorrectly decided and should not remain binding precedent.

Stare decisis counsels against overruling a prior decision, but it consists of "a series of prudential and pragmatic considerations" to promote the rule of law and "gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992). Here, those prudential concerns are outweighed by the importance of straightening the precedent of property and free speech law. The *PruneYard* approach has

required repeated refinements and distinctions. In the realm of takings, this Court distinguished the case in *Loretto,* 458 U.S. at 435 n.12, holding that while the relatively tiny physical invasion in that case was a *per se* taking, the far more significant invasion in *PruneYard* was not, due to the fact that the latter was "temporary." Yet in *First English*, this Court observed that temporary invasions of property rights are nevertheless compensable takings. 482 U.S. at 318. First Amendment decisions have also distinguished *PruneYard.* In *Hurley*, 515 U.S. 557, the Court found that the operators of a private parade could not be forced to allow activists to march in the parade, and distinguished *PruneYard* on the grounds that the parade's operators were likely to be seen as endorsing the trespassers' message, while the mall owners would not have been. *See id.* at 580. Yet this "attribution" distinction did not operate at all in *Wooley,* 430 U.S. 705, where there was no suggestion that anyone would attribute the state's message of "live free or die" to the plaintiff.

In *Pacific Gas and Electric Co.*, this Court employed a different distinction, finding that the utility company owners disagreed with the opinions expressed in the pamphlets they were forced to distribute, while the owners of the PruneYard shopping center had not disagreed with the message expressed by the trespassers. But disagreement was not found to be essential in *Tornillo*, 418 U.S. at 258, where the First Amendment barred the government from requiring newspapers to provide space for others' expression, even though there was no suggestion that readers would assume the newspaper agreed with the message.

The unworkability of *PruneYard* is also indicated by the fact that other states have avoided its impracticable results by holding that their state constitutions do not require shopping centers to admit speakers and solicitors. *See, e.g., Cologne,* 469 A.2d 1201; *Western Pennsylvania Socialist Workers 1982 Campaign,* 515 A.3d 1331; *Citizens for Ethical Government, Inc.,* 392 S.E.2d 8; *Slanco,* 626 N.E.2d 59. These decisions have been based on state courts' recognition that the *PruneYard* approach violates property owners' interconnected rights of exclusion and expression. Thus the *PruneYard* rule has not led to the kind of reliance concerns that should be avoided by maintaining that rule—on the contrary, even California courts have narrowed the case's applicability. *See Golden Gateway,* 26 Cal. 4th 1013; *Albertson's, Inc. v. Young,* 107 Cal. App. 4th 106, 109-10 (2003).

The *PruneYard* decision—allowing the government to force property owners to allow persons on their land to express political opinions when the owners would prefer not to speak and not to subsidize that speech—is inconsistent with basic principles of free expression and private property. This case is an appropriate opportunity to reconsider the decision and overrule it.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

DATED: September, 2009.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
HAROLD E. JOHNSON
TIMOTHY SANDEFUR
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation